Filed 4/13/10 Franklin v. Pace CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MAURICE EDWARD FRANKLIN, Plaintiff and Appellant, v. DEAN FRANCIS PACE, Defendant and Respondent.	B213991 (Los Angeles County Super. Ct. No. SC096804)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joseph S. Biderman, Judge. Affirmed.

Maurice Edward Franklin, in pro. per.; Maurice Edward Franklin Law Offices for Plaintiff and Appellant.

Dean Francis Pace, in pro. per.; Pace and Rose for Defendant and Respondent.

* * * * * *

Plaintiff and appellant Maurice Edward Franklin, an attorney, referred a client to defendant and respondent Dean Francis Pace, also an attorney. After receiving more than $450,000 in referral fees, appellant sued respondent for additional fees of $102,332. Respondents' motion for summary judgment on the ground that the action was barred by the applicable statutes of limitations was granted by the trial court. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1995, appellant referred client Daniel Jordan to respondent regarding Jordan's claim under the Federal False Claims Act (31 U.S.C. § 3729 et seq.) against his employer, Northrop Gruman Corporation (Northrop) (the qui tam action). In April 1995, appellant, respondent and Jordan executed a written "Retainer Agreement" in which Jordan agreed that respondent would pay appellant 20 percent of the attorney fees received by respondent from Jordan, excluding costs and expenses of the qui tam action.

In 1998, there was a partial settlement of the qui tam action, and appellant received $47,507.38 for his referral. After the qui tam action was finally settled, on October 1, 2003 appellant, respondent and Jordan executed and signed a written "Settlement Agreement and Mutual Release," in which appellant acknowledged that he had received $456,674, which represented his 20 percent share of attorney fees from the government's portion of the settlement. The October 1, 2003 settlement agreement further provided that appellant "is entitled to 20% of the attorneys fees which are actually received by [respondent] paid by Northrop," after deducting costs and expenses, and that respondent "hereby agrees to pay [appellant] 20% of attorneys fees, if any, which [respondent] receives from Jordan in the future."

On November 20, 2003, appellant, respondent, Jordan and Northrop executed an "Agreement Re Payment of Attorneys' Fees, Costs and Expenses," in which Northrop agreed to wire transfer to respondent $1,187,602.40 in full satisfaction of all attorney fees, costs and expenses it owed for all recoverable legal work within five business days of the full execution of the agreement (the Northrop agreement). It is undisputed that five business days after execution of the agreement was November 28, 2003.

On December 22, 2003, respondent sent a letter to appellant and his attorney, stating that appellant was "causing interference and obstruction with the orderly adjudication of the qui tam action." The letter attached a second "Settlement Agreement and Mutual Release," to be signed by Jordan, appellant and respondent, which provided that appellant was entitled to receive the additional sum of $102,332 from the attorney fees actually received by respondent from Northrop. The December 22, 2003 letter further stated that the second agreement had been provided to appellant's attorney for "review for many weeks," and that if appellant "*refuses to sign the final Settlement Agreement and Mutual Release on or before December 30, 2003, no additional funds shall be paid to him until he does so*." (Italics added.)

Respondent and Jordan signed the second settlement agreement and mutual release on January 2, 2004. Respondent again asked appellant to sign the second agreement by letter dated January 28, 2004, "whereupon the annexed check in the sum of $102,332 will be concurrently delivered" to appellant. Appellant never signed the second agreement.

By letter dated October 4, 2005, respondent asked appellant's attorney to remind appellant of respondent's numerous letters advising of the significant counterclaims to any claims by appellant in excess of the $456,674 which had already been paid "for simply a referral of litigation which he repeatedly disrupted by inept legal advice and threats of physical violence." The letter attached a September 30, 2005 letter from appellant to respondent, in which appellant stated: "Why am I being 'pugnacious,' because you refuse, and you have refused for nearly two (2) years, to perform the obligations imposed upon you by your October 1, 2003 'Settlement Agreement and Mutual Release.'"

On January 23, 2008, appellant filed a form complaint against respondent for three causes of action—breach of contract, account stated and declaratory relief. The complaint alleged that respondent had breached the October 1, 2003 settlement agreement on January 28, 2004 by failing to pay appellant $102,332, which represented appellant's 20 percent share of attorney fees from the Northrop award, and sought an accounting of 20 percent of any other fees received by respondent from Jordan since

January 28, 2004. Respondent demurred to the complaint on the ground, among others, that it was barred by the applicable statutes of limitations. The trial court overruled the demurrer, and respondent filed his answer, asserting the statutes of limitations as an affirmative defense.

Respondent subsequently filed a motion for summary judgment, renewing his argument that the complaint was barred by the applicable statutes of limitations. In support of his motion, respondent relied on three pieces of evidence: (1) his December 22, 2003 letter to appellant; (2) his and his assistant's declarations which stated that appellant had not signed any further settlement agreement and mutual release before December 30, 2003, or at any time, for the $102,332 amount; and (3) Jordan's declaration stating that he had not paid any attorney fees to respondent after October 1, 2003, and that he did not agree nor approve that appellant should receive any additional fees.

In opposition to the summary judgment motion, appellant argued that respondent's December 22, 2003 letter did not constitute an unequivocal repudiation of the parties' October 1, 2003 settlement agreement, but that even if it did, he had the option of treating the letter as an anticipatory breach and suing immediately, or treating it as an empty threat and waiting for the time of performance, which he claimed would be a reasonable time since the October 1, 2003 settlement agreement did not specify a deadline.

Appellant relied on several pieces of evidence to support his opposition, including the following: (1) a copy of the Northrop agreement, which was missing a signature on Northrop's behalf; (2) the new "Settlement Agreement and Mutual Release" signed on January 2, 2004 by respondent and Jordan; (3) respondent's January 28, 2004 letter; and (4) respondent's October 4, 2005 letter, attaching appellant's September 30, 2005 letter.

In reply, respondent argued that his January 28, 2004 letter to appellant was "a new settlement offer completely independent of any previous agreement" with appellant, and contained the express condition precedent that appellant sign the second settlement agreement and mutual release, which had already been signed by respondent and Jordan, in order to receive the $102,332 sum. Respondent also argued that prior to January 23,

2004, appellant was twice put on notice of payment by Northrop: (1) by the Northrop agreement specifying that Northrop's payment would be wire transferred to respondent within five business days of the execution of the agreement, which was signed by all parties on November 20, 2003, and (2) the December 22, 2003 letter stating that no additional funds would be paid unless appellant signed the second settlement agreement and mutual release, which should have put appellant on notice to have at least inquired of the fixed date of performance by Northrop.

At the hearing on the summary judgment motion, respondent produced a copy of the Northrop agreement, which contained the signature of Northrop's attorney, dated November 20, 2003, the same date the agreement was signed by the other signatories, including appellant. The court granted the motion, finding that at the very latest, appellant was clearly notified of respondent's breach of the October 1, 2003 settlement agreement by respondent's December 22, 2003 letter. The court noted that the parties' October 1, 2003 settlement agreement required respondent to pay appellant 20 percent of Northrop's fees upon his actual receipt of those fees and did not condition payment on any further performance by appellant; thus, "by hinging his performance on additional terms not agreed upon, [respondent] breached the 10/[1]/03 agreement" on December 22, 2003. As such, the lawsuit filed more than four years later was time-barred. This appeal followed.

DISCUSSION

I. Code of Civil Procedure Section 458.

As an initial matter, we address appellant's contention that respondent has waived his statutes of limitations affirmative defense because he failed to comply with the pleading requirements of Code of Civil Procedure section 458. That statute provides: "In pleading the Statute of Limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of Section ____ (giving the number of the section *and subdivision thereof*, if it is so divided, relied upon) of the Code of Civil Procedure; and if such allegation be

controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred." (Code Civ. Proc., § 458, italics added.)

It is undisputed that the applicable limitations period on each of appellant's three causes of action is four years—breach of contract (Code Civ. Proc., § 337, subd. 1); account stated (Code Civ. Proc., § 337, subd. 2); and declaratory relief (Code Civ. Proc., § 343). In his answer, respondent properly cited these sections, but did not specify any subdivisions of section 337. Appellant relies on *Brown v. World Church* (1969) 272 Cal.App.2d 684, 691, which held that the failure to specify the particular subdivision or subdivisions renders the defense invalid. We find otherwise here for two reasons.

First, Code of Civil Procedure section 337 has three subdivisions, only two of which could possibly be applicable here. Subdivision 1 applies to actions upon written contracts (i.e., breach of contract), and subdivision 2 applies to actions on accounts stated. Subdivision 3 applies to actions based upon the rescission of a written contract, but there is no cause of action alleged in the complaint for rescission of contract. (See *Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, 1165 and *Orr v. City of Stockton* (2007) 150 Cal.App.4th 622, 628–629, fn. 3 [each finding defense still valid where no other subdivision could apply].)

Second, documents filed before the answer specified the specific subdivisions (see, e.g., appellant's opposition to demurrer and the court's minute order on demurrer). There could simply be no confusion to either appellant or the court as to which particular subdivisions applied, and therefore there was no prejudice to appellant. (See *Orr v. City of Stockton*, *supra*, 150 Cal.App.4th at p. 629, fn. 3 [noting applicable subdivisions had been specified in pleadings filed prior to answer].) Under these circumstances, we conclude that respondent's failure to specify the applicable subdivisions in his answer did not constitute a waiver of the statutes of limitations defense.

II. Summary Judgment Was Properly Granted.

A. Standard of Review

We review a summary judgment de novo to determine whether there is a triable issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. (*Galanty v. Paul Revere Life Ins. Co*. (2000) 23 Cal.4th 368, 374; Code Civ. Proc., § 437c, subd. (c).) To be entitled to judgment as a matter of law, the moving party must show by admissible evidence that the "action has no merit or that there is no defense" thereto. (Code Civ. Proc., § 437c, subd. (a).) A defendant moving for summary judgment meets this burden by presenting evidence demonstrating that one or more elements of the cause of action cannot be established or that there is a complete defense to the action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849–850, 853–854.) Once the defendant makes this showing, the burden shifts to the plaintiff to show that a triable issue of material fact exists as to that cause of action or defense. (Code Civ. Proc., § 437c, subd. (p)(2); see *Aguilar, supra*, at p. 850.) A plaintiff cannot rely upon the mere allegations or denials of its pleadings, but "shall set forth the specific facts" based on admissible evidence showing a triable issue exists. (Code Civ. Proc., § 437c, subd. (p)(2); *Borders Online v. State Bd. of Equalization* (2005) 129 Cal.App.4th 1179, 1188.) "'While resolution of the statute of limitations issue is normally a question of fact, where the uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper.'" (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487.)

B. Breach of Contract

"A cause of action for breach of contract does not accrue before the time of breach. [Citations.] We have established that: 'There can be no *actual* breach of a contract until the time specified therein for performance has arrived.'" (*Romano v. Rockwell Internat., Inc., supra,* 14 Cal.4th at p. 488.)

Appellant is correct that we must examine "the specifications for performance contained in the contracts" to determine the time for performance. (*Taylor v. Johnston*

(1975) 15 Cal.3d 130, 136.) Here, the October 1, 2003 settlement agreement and mutual release, upon which appellant bases his breach of contract claim, obligated respondent to pay appellant his 20 percent share of the Northrop award when respondent had "actually received" the payment from Northrop. The Northrop agreement, which appellant signed, obligated Northrop to wire transfer its payment to respondent by November 28, 2003. Appellant points out that his copy of the Northrop agreement was missing a signature on behalf of Northrop. But at the hearing on the summary judgment motion, respondent produced a fully executed copy of the Northrop agreement signed by all parties on November 20, 2003. Appellant also points out that respondent produced no evidence establishing when he actually received Northrop's payment. But appellant, on the other hand, produced no evidence creating a triable issue of fact that respondent did not receive the Northrop payment on or around November 28, 2003. Indeed, it would have made no sense for respondent to have sent the December 22, 2003 letter demanding that appellant sign a new settlement agreement in order to collect his $102,332 share if respondent was not in a position to pay appellant this amount. Furthermore, the letter indicated that "for many weeks" appellant's attorney had been reviewing the new settlement agreement and mutual release, which specified the sum of $102,332. Thus, the logical and uncontradicted inference is that respondent's obligation to pay appellant his 20 percent share of the Northrop payment, or $102,332, arose on or about November 28, 2003.

But respondent did not pay appellant the $102,332 owed to him on or after November 28, 2003. Instead, by letter dated December 22, 2003, respondent insisted that appellant sign a *new* settlement agreement and mutual release in order to receive his share. But the October 1, 2003 settlement agreement did not condition appellant's receipt of his 20 percent share of the Northrop payment on any further performance by appellant; rather, it obligated respondent to pay the fee to appellant when respondent "actually received" the Northrop payment. Because respondent was not entitled to condition his obligation to pay appellant upon appellant's execution of another settlement agreement, we agree with the trial court that respondent breached his obligation under the October 1, 2003 settlement agreement, at the latest, on December 22, 2003.

Appellant argues that, at best, the December 22, 2003 letter constituted a repudiation of the October 1, 2003 settlement agreement and therefore gave appellant the option of treating the letter as an anticipatory breach and suing immediately for breach of contract or treating the repudiation as an empty threat and waiting until the time for performance had arrived. (*Romano v. Rockwell Internat., Inc., supra,* 14 Cal.4th at p. 489.) Appellant contends that the letter was a repudiation of respondent's obligation because it was made *before* the time for performance of the obligation to pay the referral fee had arrived, "i.e., before [respondent] had 'actually received' the $1,187,602.40 attorneys' fees, expenses and costs from Northrop." But as noted above, appellant presented no evidence establishing that respondent did not actually receive the Northrop payment on or about November 28, 2003. Because the undisputed evidence gives rise to the inference that respondent's obligation to pay appellant arose on or about November 28, 2003, the December 22, 2003 letter was not a repudiation, but an actual breach of the October 1, 2003 settlement agreement.

Appellant nevertheless maintains that the breach did not occur until respondent sent his January 28, 2004 "take it or leave it" letter, because the December 22, 2003 letter still gave respondent the option of paying even if appellant did not sign the new settlement agreement and mutual release by the deadline of December 30, 2003. But appellant misses the point. It was not the deadline to sign the new settlement agreement that constituted the breach; rather, it was the fact that respondent refused to pay at all *unless* appellant signed a new agreement. Because the October 1, 2003 settlement agreement did not require any such performance by appellant, respondent's conditioning of the payment he owed to appellant on appellant's signing of a new agreement was a breach of the October 1, 2003 settlement agreement. Respondent made his breach clearly known by the December 22, 2003 letter.

We find no merit in appellant's argument that even if the breach occurred by December 22, 2003, he was entitled to the benefit of the delayed discovery rule to toll the

statutes of limitations.[1] (See *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 833 [applying discovery rule to breach of contract claim].) First, it is appellant's obligation to plead and prove delayed discovery (*id*. at p. 832), and appellant failed to plead any facts in his complaint sufficient to invoke the rule. Second, even if appellant had pled delayed discovery, the rule would have no application here. "[T]he discovery rule may be applied to breaches which can be, and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time." (*Id*. at p. 832.) There is no evidence that the Northrop payment to respondent, from which appellant was to be paid his 20 percent fee of $102,332, was made in secret. Appellant himself had signed the Northrop agreement specifying the date by which Northrop was to wire transfer its payment to respondent. At the very latest, respondent's December 22, 2003 letter should have triggered an investigation by appellant of when the Northrop payment was made. As the trial court correctly found, there was simply no showing by appellant that respondent's breach was committed in secret or that the receipt of the Northrop funds and respondent's refusal to pay was not discoverable by the end of December 2003.

Accordingly, we agree with the trial court that appellant failed to raise a triable issue of fact as to whether his breach of contract claim was time-barred under Code of Civil Procedure section 337, subdivision 1.

C. Remaining Causes of Action

The trial court found that appellant's remaining causes of action for account stated and declaratory relief were also time-barred because they were not filed within four years

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[1] Appellant makes this same argument to counter respondent's contention that the breach of contract occurred on the date of the settlement agreement, October 1, 2003. We give respondent's contention no consideration because the Northrop agreement clearly stated that Northrop would make its payment to respondent within five business days of November 20, 2003. Under the October 1, 2003 settlement agreement, respondent had no obligation to pay appellant until he actually received Northrop's payment.

of 2003. On appeal, appellant makes no arguments challenging these findings, nor does he cite to the record or to any authorities. Because it is appellant's obligation to demonstrate error, appellant has forfeited any challenge to these findings. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2.)

DISPOSITION

The summary judgment is affirmed. Respondent is entitled to recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ